United States Senate

Republican Policy Committee

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Courts Continue to Redefine Marriage Despite Public Opposition

Why a Marriage Amendment is Necessary

Executive Summary

- Same-sex marriage advocates are continuing their campaign to convince state and federal courts to rewrite traditional marriage laws.
    - Today, 9 states face lawsuits challenging their traditional marriage laws.
    - State supreme courts in New Jersey, Washington, and New York, in particular, could decide same-sex marriage cases in 2006.
- The American people oppose court-mandated same-sex marriage.
    - Today, 45 states have statutory or constitutional protection for traditional marriage, as Americans have been spurred to action throughout the nation.
    - Opinion polls show support for same-sex marriage at between 20 and 39 percent.
- The federal Defense of Marriage Act ("DOMA") does not solve the problem of court-mandated same-sex marriage.
    - DOMA's reach is very limited, and the law has very little effect on the long-term outcome of the same-sex marriage advocates' litigation strategy.
    - DOMA does not prevent state or federal courts from mandating same-sex marriage.
    - Nor does DOMA stop courts from forcing government to create "civil unions."
- It is hard to imagine how the nation could function with vastly different answers to the marriage question on a state-by-state basis.
    - The legal and cultural complications of a patchwork, state-by-state approach will not be sustainable.
    - Any effort to reserve this question to the states — either by conscious design or through lack of leadership — will guarantee the imposition of same-sex marriage by the nation's courts.
- The solution is to send the states a constitutional amendment that protects traditional marriage laws and prevents judicial activism, because no other process is guaranteed to prevent the redefinition of marriage.

Introduction

In the 108th Congress, both the Senate and the House considered a constitutional amendment to protect traditional marriage. In the Senate, Democrats filibustered the motion to proceed to the amendment, and cloture on the motion to proceed failed 48-50.[1] In the House, the amendment received 227 votes, well shy of the two-thirds vote required to send an amendment to the states.[2] Backers of the constitutional amendment warned that the failure to send the amendment to the people for ratification would allow further judicial activism in state and federal courts, and they were right. Since those 2004 votes, state courts in Washington, New York, California, Maryland, and Oregon have found traditional marriage laws unconstitutional, and a federal judge in Nebraska has struck down a state constitutional amendment.[3] It is plain that the same-sex marriage advocates' campaign through the courts continues unabated. The only way to ensure that the American people, rather than judges, decide this fundamental question about the future of marriage in America is to offer them the opportunity to consider and ratify a constitutional amendment through their state legislatures.

Same-Sex Marriage Advocates Continue their Campaign in the Courts

The advocates of same-sex marriage have been executing a carefully plotted litigation strategy for the past 15 years, and it has begun to bear fruit.[4] This campaign began in 1990 when legal activists sued to force Hawaii to abandon its traditional marriage laws and permit same-sex marriage. The Hawaii Supreme Court ruled in the activists' favor, holding that marriage should be redefined by judicial decision, but the Hawaiian people passed a state constitutional amendment to take the issue away from the judges and return it to the legislature. The activists then won a partial victory in 1999 when the Vermont Supreme Court ruled that all the rights and benefits of civil marriage must be extended to same-sex couples. Under threat of court-imposed same-sex marriage, the Vermont legislature grudgingly created same-sex "civil unions." But the culmination of the campaign through the courts came in 2003, when the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Massachusetts Dep't of Health*, 798 N.E. 2d 941 (Mass. 2003), that marriage itself must be redefined to include same-sex couples, and that traditional marriage laws were a "stain" on the state constitution that must be "eradicate[d]."[5]

Summary of Pending Lawsuits

As predicted at the time, the Massachusetts decision in *Goodridge* proved the catalyst for a flood of new lawsuits. As of March 2006, nine states face active lawsuits challenging their

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[1] See Record Vote #155 (108th Cong., 2nd Sess.), July 13, 2004 (motion to invoke cloture on the motion to proceed to S. J. Res. 40).

[2] See Record Vote #484 (108th Cong., 2nd Sess.), September 30, 2004 (on passage of H. J. Res. 106).

[3] The Oregon trial court's decision was mooted when Oregonians passed a state constitutional amendment defining marriage as only man-woman. Ashbel S. Green and Michelle Cole, *Court Annuls Gay Marriages*, The Oregonian, April 15, 2005. The other state cases are on appeal in the state court systems, and the Nebraska federal decision is on appeal to the U.S. Court of Appeals to the 8th Circuit.

[4] For a discussion of same-sex litigation in the 1970s through the 1990s, see William Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. Pub. L. 623 (2004), and Greg Johnson, *Vermont Civil Unions: the New Language of Marriage*, 25 Vt. L. Rev. 15 (2000).

[5] For a summary of *Goodridge v. Massachusetts Dep't of Health* and the related opinion captioned *Opinions of the Justices to the Senate*, SJC 09163 (Feb. 3, 2004), see Senate Republican Policy Committee, *Judicial Activism Forces Same-Sex Marriage on the Nation*, February 11, 2004, available at http://rpc.senate.gov/_files/Feb1104Marriage2SD.pdf.

traditional marriage laws: California, Connecticut, Iowa, Maryland, Nebraska, New Jersey, New York, Oklahoma, and Washington.[6] Those cases are summarized in Chart #1, below:

Chart #1: Status of Pending Lawsuits Challenging State Marriage Laws

California	Direct challenge to state marriage laws. Plaintiffs seek redefinition of marriage to allow same-sex marriage. Filed in 2004. Plaintiffs won in trial court in April 2005. Appeal is now pending in state court of appeals in San Francisco. A complete timeline is unclear, but no final decision from state supreme court is expected until 2007 at the earliest.
Connecticut	Direct challenge to state marriage laws. Plaintiffs seek redefinition of marriage to allow same-sex marriage. Filed in 2004. Case is pending in state trial court in New Haven. A complete timeline is unclear, but no final decision from state supreme court is expected until 2007 at the earliest.
Iowa	Direct challenge to state marriage laws. Plaintiffs seek redefinition of marriage to allow same-sex marriage. Filed in 2005. Case is pending in state trial court. A complete timeline is unclear, but no final decision from state supreme court is expected until 2007 at the earliest.
Maryland	Direct challenge to state marriage laws. Plaintiffs seek redefinition of marriage to allow same-sex marriage. Filed in 2004. Plaintiffs won in trial court in January 2006, and state has said it will appeal. A complete timeline is unclear, but no final decision from state supreme court is expected until 2007 at the earliest.
Nebraska	Federal constitutional challenge to state constitutional amendment protecting traditional marriage. Plaintiffs won in federal district court, and the state appealed to the federal appeals court. Oral arguments were heard in February 2006, and a **decision is expected in the spring or summer of 2006.**
New Jersey	Direct challenge to state marriage laws. Plaintiffs seek redefinition of marriage to allow same-sex marriage. Filed in 2002. The state successfully defended traditional marriage laws in trial and appeals court, and the case is now before the state supreme court. Oral arguments were heard in February 2006, and a **decision is expected in the summer or fall 2006.**
New York	Multiple direct challenges to state marriage laws. Plaintiffs seek redefinition of marriage to allow same-sex marriage. Filed in 2004. After conflicting results in lower state courts, the state's highest court is now reviewing the case. A decision **is expected no sooner than late 2006.**
Oklahoma	Federal constitutional challenge to state constitutional amendment protecting traditional marriage. Plaintiffs also challenge federal DOMA. Filed in 2004. Case is pending in federal district court. A motion to dismiss has been pending since January 2005, and a **decision is expected in 2006.**
Washington	Direct challenge to state marriage laws. Plaintiffs seek redefinition of marriage to allow same-sex marriage. Filed in 2004. Plaintiffs won in state trial court, and the cases are now on appeal to the state supreme court. Oral arguments were heard in March 2005, and a **decision is expected in 2006.**

Note that in four of those states facing current challenges — California, Maryland, New York, and Washington — state trial courts have already struck down marriage laws and found a right to same-sex marriage in state constitutional provisions dealing with equal protection and due process. Those decisions are stayed pending appeal. State courts in Hawaii, Alaska, and Oregon

[6] See discussion of likely effects of Massachusetts decision in Senate Republican Policy Committee, *The Threat to Marriage from the Courts*, July 29, 2003, available at http://rpc.senate.gov/_files/CIVILsd090403.pdf, and the Senate Republican Policy Committee report of February 11, 2004, supra note 5.

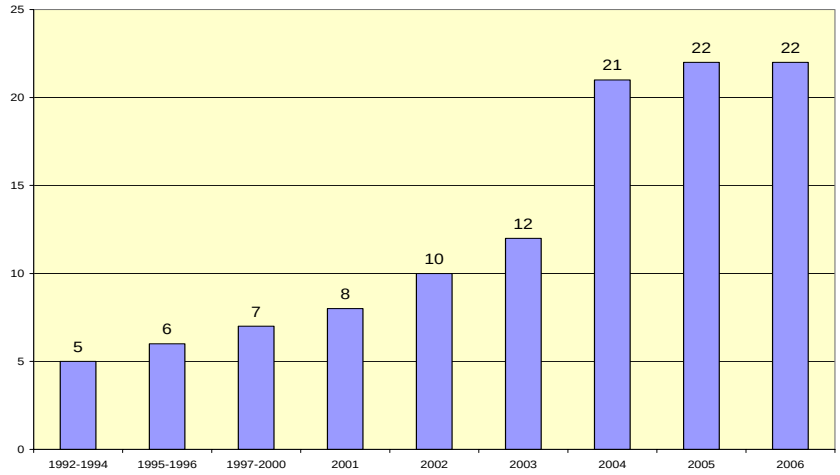
had previously done the same, but state constitutional amendments subsequently reversed those decisions.

Most of the challenges facing traditional marriage are in state courts, but same-sex marriage advocates have made federal constitutional claims. For example, the ACLU convinced a federal district court to strike down Nebraska's popularly enacted state constitutional amendment protecting traditional marriage. (That case is on appeal to the U.S. Court of Appeals for the 8th Circuit.[7]) Moreover, challenges to the federal Defense of Marriage Act ("DOMA") are pending in federal district courts in Oklahoma and Washington, and before the U.S. Court of Appeals for the Ninth Circuit.

The Increase in Legal Challenges

These current lawsuits are part of a growing trend. Until recently, very few states had seen attacks on their marriage laws. As Chart #2 below demonstrates, as of 1992, lawsuits had been filed in Minnesota (1970), Kentucky (1973), Washington (1974), Colorado (1980), and Hawaii (1990). As the Hawaii case gained traction, activists filed new lawsuits in Alaska (1995), Vermont (1997), Massachusetts (2001), New Jersey (2002), Indiana (2002), Arizona (2003), and Nebraska (2003). Since the Massachusetts high court struck down traditional marriage laws in 2003, cases were filed in Alabama, California, Connecticut, Florida, Maryland, New York, North Carolina, Oklahoma, and West Virginia in 2004, and in Iowa in 2005.[8] In many of these states, such as Florida, California, and New York, more than one lawsuit was filed.[9]

Chart #2: Number of States in Which Marriage Laws Have Been Challenged in Court (Cumulative)



As this chart demonstrates, the number of states that have faced challenges to their marriage laws has more than *quadrupled* since the early 1990s.

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[7] Oral arguments were heard in the Nebraska case on February 13, 2006.

[8] The anti-democratic nature of this court campaign is perhaps best illustrated in Iowa, where the activists want the state courts to overturn a state DOMA — although 65 percent of Iowans are opposed to same-sex marriage. See Jonathan Roos, *Most Iowans oppose same-sex marriage*, Des Moines Register, October 17, 2003.

[9] For information on the cases filed in the 1970s through the 1990s, see Duncan, 18 BYU J. Pub. L: 623, supra note 4. For the more recent cases, see Senate Republican Policy Committee, *State-by-State Same-Sex Marriage Developments*, October 21, 2004 (and as updated periodically), available at http://rpc.senate.gov/_files/Oct2104MarriageChartSJD.pdf.

The Common Thread in the Lawsuits Challenging Traditional Marriage Laws

These lawsuits are brought under a variety of state constitutions or, in the federal cases, they are based on the U.S. Constitution, but the cases' substance are very similar.

First, nearly all the lawsuits are brought by the same cadre of legal activists at the American Civil Liberties Union, the Gay & Lesbian Advocates & Defenders, Lambda Legal Defense & Education Fund, and the Freedom to Marry coalition. This is a coordinated and well-funded national campaign.[10]

Second, on substance, these advocates regularly argue that civil marriage is a fundamental right; that denying civil marriage to same-sex couples violates their right to equal treatment based on sex and sexual orientation; and that the state can offer no legitimate justification for not redefining marriage to include same-sex couples.

Third, the advocates frequently rely on the U.S. Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that sodomy bans are unconstitutional) and *Romer v. Evans* 517 U.S. 620 (1996) (holding unconstitutional a Colorado state constitutional amendment barring enactment of laws aimed at benefiting homosexuals), as general support for the transformation of equal protection and due process jurisprudence to require same-sex marriage. Even those challenges that purportedly rely on state law also look to federal cases for support.

Finally, the advocates often rely on the Massachusetts decision in *Goodridge* as persuasive authority, along with the similar trial court opinions in Washington and New York. Thus, in our integrated legal system, court cases in one state affect litigation elsewhere; one cannot argue that what happens in Massachusetts has no extraterritorial impact.

The American People Oppose Court-Mandated Same-Sex Marriage

The American people do not support court-imposed same-sex marriage, and they have been working through the political process to protect the institution. This activity is relevant to the present debate, because it demonstrates the people's desire to preserve traditional marriage and to keep any changes to the institution squarely within the political realm and out of the courts. It also illustrates their frustration with a court system that many no longer trust to protect their values.[11]

Citizens Are Fighting to Protect State Marriage Laws

As Chart #3 below shows, when the advocates began this effort in Hawaii in the early 1990s, only a few states had expressly defined marriage as between a man and a woman (although state common law typically assumed it). Moreover, no states had amended their constitutions to protect against state court judicial activism. After the Hawaii court attempted to redefine marriage, however, citizens became politically engaged to ensure that their states' laws

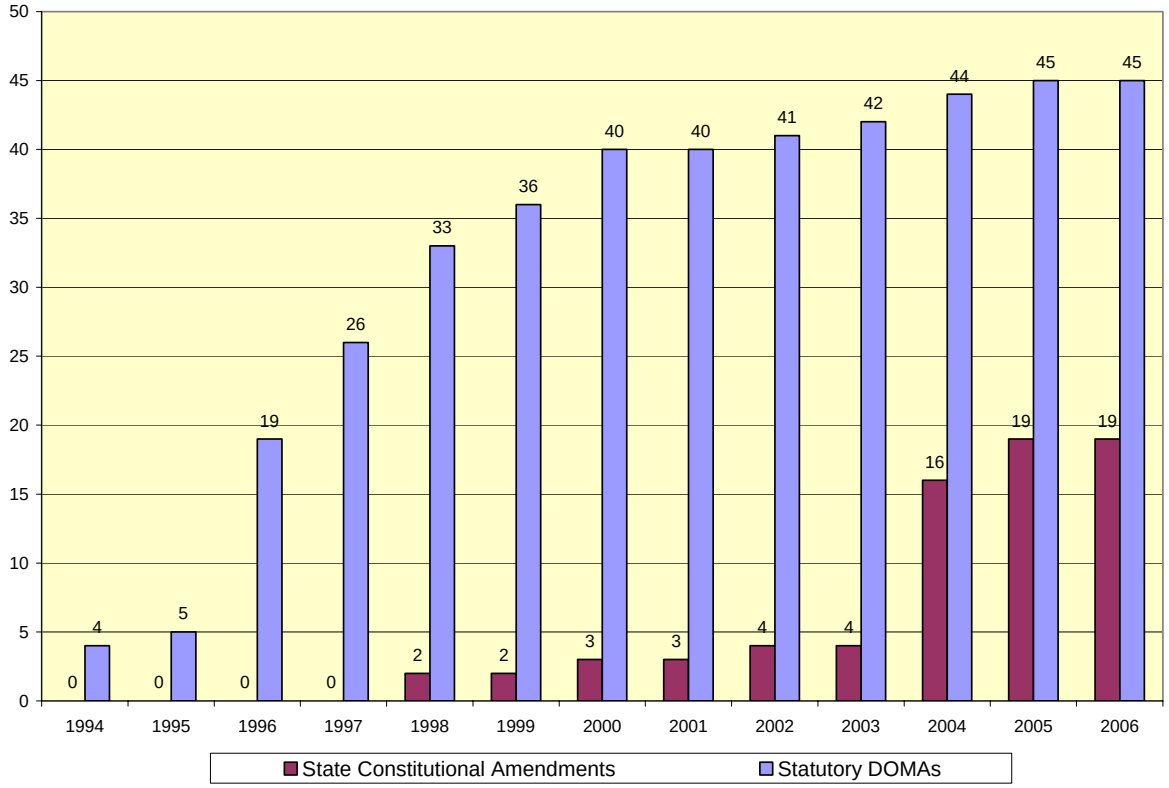
[10] For a discussion of the express coordination, see E.J. Graff, *Marital Blitz*, The American Prospect, March 2006, at 41 (discussing the new "15-year strategy" to "win marriage equality").

[11] In a September 2005 poll, 56 percent of respondents agreed with the statement: "Judicial activism … seems to have reached a crisis. Judges routinely overrule the will of the people, invent new rights and ignore traditional morality." Survey conducted for the ABA Journal eReport by Opinion Research Group. See Martha Neil, *Half of U.S. sees 'Judicial Activism' Crisis*, ABA Journal eReport, September 30, 2005, available at http://www.abanet.org/journal/ereport/s30survey.html.

were clear. After Americans saw just how far judges would go — striking down the basic definition of marriage, and calling for its "eradicate[ion]"[12] — they stepped up their activity and began to enact constitutional amendments that would shield the marriage definition from the judges.

The only states without statutory protections for traditional marriage are Massachusetts, New Jersey, New Mexico, New York, and Rhode Island. Moreover, voters in at least seven states will consider state constitutional amendments in 2006, including Alabama, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin. Other states with more cumbersome constitutional amendment processes, such as Indiana, are following their state-specific processes to ensure that their state constitutions are amended as soon as possible.[13]

Chart #3: State Efforts to Protect Traditional Marriage through Statutory and Constitutional Defense of Marriage Acts



Not only have nearly all states enacted some form of protection for traditional marriage, but they have done so with supermajority support. As Chart #4 on the following page demonstrates, in the 19 states that have considered state constitutional amendments, all have passed, and with an average support of 71.5 percent.

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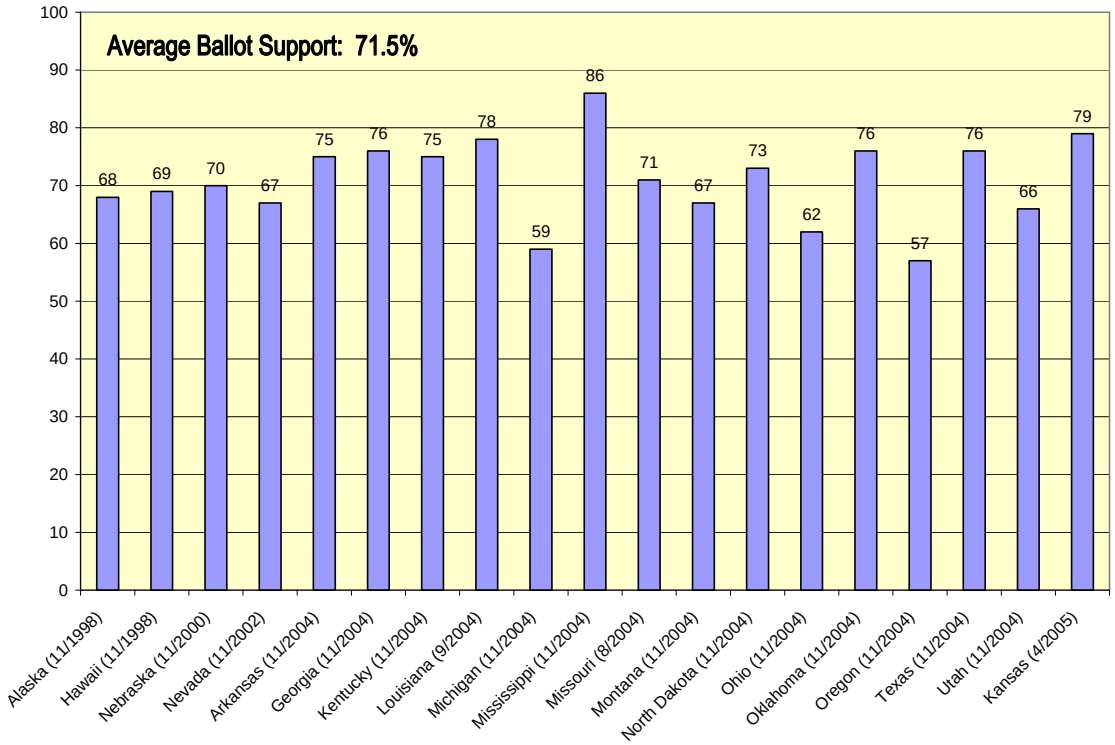
[12] See *Goodridge v. Massachusetts Dep't of Health*, 798 N.E. 2d 941 (Mass. 2003) and the related opinion captioned *Opinions of the Justices to the Senate*, SJC 09163 (Feb. 3, 2004). See also Senate Republican Policy Committee, *Judicial Activism Forces Same-Sex Marriage on the Nation*, February 11, 2004, available at http://rpc.senate.gov/_files/Feb1104Marriage2SD.pdf, for a summary of those decisions.

[13] In Indiana, the legislature passed a state constitutional amendment protecting marriage in 2005. It must approve the amendment again during its next session, and then the amendment can go to voters for their approval. See M.B. Scheider, *Indiana House OKs gay-marriage ban*, Indianapolis Star, March 23, 2005.

Chart #4: Balloted Results for State Constitutional Amendments



It is worth noting that the support for constitutional protections for marriage laws was strong regardless of whether the elections occurred in conjunction with higher-turnout elections such as November 2004 or state primary or special elections (in Louisiana, Missouri, and Kansas).

Opinion Polling Shows Consistent Public Opposition to Same-Sex Marriage

Nationwide public opinion polling shows very little support for redefining traditional marriage. As the American Enterprise Institute concludes in its analysis of public opinion for the past five years, "around a quarter [of the public] supports gay marriage."[14] Even in Massachusetts, polled support for same-sex marriage was only 50 percent before the court imposed it on the state.[15] To provide some perspective, only 14 percent of Mississippians voted against a state constitutional amendment to protect marriage in 2004.

The polling on a federal constitutional amendment is less clear. Only two national polls were taken in 2005, with the results showing support for a federal constitutional amendment at

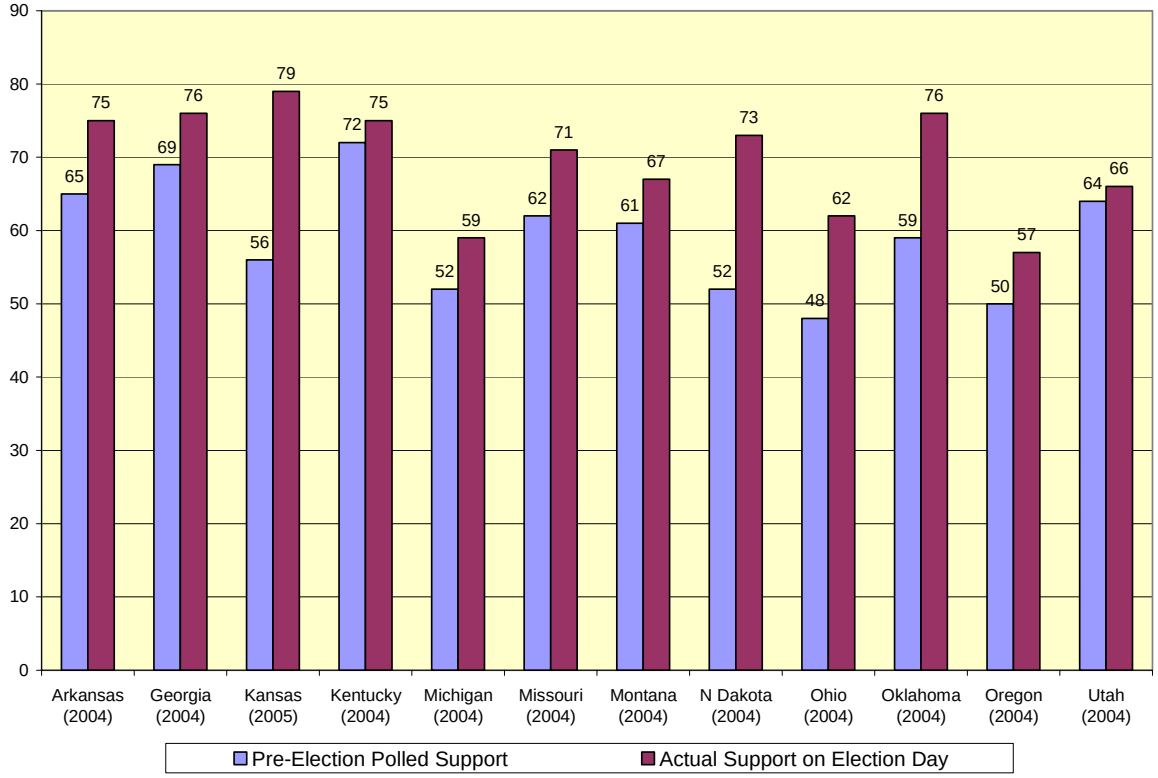
[14] See Karlyn Bowman, *Attitudes about homosexuality and gay marriage*, American Enterprise Institute, May 20, 2005, available at http://www.aei.org/publications/filter.,pubID.14882/pub_detail.asp. See also nationwide polls by the Pew Research Center, July 13-17, 2005 (36% favor), Boston Globe, May 4-9, 2005 (37%), CNN/USA Today/Gallup, April 29-May 1, 2005 (39%), ABC News/Washington Post, April 21-24, 2005 (27%), CNN/USA Today/Gallup, March 18-20, 2005 (20%), CBS News/New York Times, February 24-28, 2005 (23%). A Pew Research Center poll released as this paper goes to press is consistent with the above results, showing only 39% support. See Associated Press, March 22, 2006.

[15] See discussion of April 2003 Massachusetts-only polling in Frank Phillips and Rick Klein, *50% in poll back SJC ruling on gay marriage*, Boston Globe, November 23, 2003, available at http://www.boston.com/news/local/articles/2003/11/23/50_in_poll_back_sjc_ruling_on_gay_marriage/.

45 and 53 percent.[16] Earlier polls, conducted when public attention was focused on the Massachusetts court decision in May 2004, showed support at more than 50 percent.[17]

There is reason to believe, however, that public opinion polls may substantially understate Americans' opposition to same-sex marriage *and* their willingness to amend the Constitution to protect traditional marriage. As noted above, *state* constitutional amendments have passed with average support of 71.5 percent. In 12 of those states, moreover, independent opinion polls were taken *prior to* the actual votes, and those polls substantially understated popular support for those amendments — *by an average of 10.5 percent.* Chart #5, below, demonstrates that gap between pre-election polled support and actual support at the ballot box.

Chart #5: Summary of State Marriage Amendments' Performance on Election Days as Compared to Available Pre-Election Opinion Polling[18]



Average Difference: 10.5%

[16] See polls by Boston Globe, May 4-9, 2005 (45%) and CNN/USA Today/Gallup, April 29-May 1, 2005 (53%). Polling from 2004 shows support ranging from 43 to 60 percent, depending on the wording of the questions. See polls gathered at http://www.pollingreport.com/civil2.htm.

[17] The *Goodridge* decision went into effect on May 17, 2004. See CBS News Poll, May 20-23, 2004 (60% support federal constitutional amendment); NBC News/Wall Street Journal Polls, June 25-28, 2004 (51%) and May 1-3, 2004 (50%).

[18] For Arkansas, see Laura Kellams, *64.8% in Poll Want Charter Defining Marriage*, Arkansas Democrat-Gazette, October 15, 2004. For Georgia, see Sonji Jacobs, *Election 2004: Foes of Gay Marriage Ban Look to Courts for Support*, Atlanta Journal-Constitution, October 3, 2004. For Kansas, see Lori O'Toole Buselt, *Hot Issues, Heated Elections*, Wichita Eagle, May 9, 2004. For Kentucky, see Deborah Yetter, *70% in Poll Back Ban of Gay Unions; Sides Prepare to Stress Views on Amendment*, Louisville Courier-Journal, May 18, 2004. For Michigan, see *New Poll Shows 52 Percent Support Constitutional Ban*, Associated Press, October 4, 2004. For Missouri, see Ken Leiser, *For Missourans in Poll, Economy is Top Issue*, St. Louis Post-Dispatch, February 1, 2004.

This consistent pattern of underpolling could have several explanations. A few of the polls were of the general population, not likely or registered voters, which could explain some of the disparity.[19] Also likely, though, is that some respondents were wary of giving their true beliefs to pollsters in light of some advocates' disturbing tendency to label opposition to gay marriage as "bigoted" or "hateful."[20] Rather than invite hostile harassment from strangers calling their homes, some respondents appear to have kept their views private, and then expressed them at the ballot box when given the opportunity. In summary, although polling for a federal constitutional amendment suggests slim majority support at present, there is reason to believe that the actual support may be higher. And more importantly, the only way to know this for sure is to send an amendment to the states for ratification, and let the local political process function.

As a final word on opinion polls, some results suggest that a majority of Americans support some form of legal recognition for same-sex couples, whether through state-sanctioned civil unions or private legal arrangements.[21] As discussed at pages 14-15, below, nothing in the constitutional amendment introduced in the House or Senate would prevent the people or their legislators from creating alternative arrangements via state law. The constitutional amendment under consideration protects marriage itself and prevents judges from stripping the American people of their ability to govern themselves on this question. If the people want to change how benefits or rights are allocated, they still would be free to do so if the amendment passes.

Federal DOMA is Inadequate to Protect Traditional Marriage Laws

Perhaps the most common misunderstanding about the same-sex marriage debate is the notion that the federal Defense of Marriage Act, Pub. L. 104-199, 100 Stat. 2419 (September 21, 1996) ("federal DOMA" or "DOMA") is a sufficient guarantor of traditional marriage laws. It is not, nor was it designed as a comprehensive solution to judicial activism on the same-sex marriage question.

What DOMA Does and Does Not Do

DOMA was a limited law passed to address two distinct issues — forced interstate recognition and the definition of marriage for the purposes of federal laws and regulations.

For Montana, see Michael Foust, *Marriage Digest: Calls Lead Congressman to Change Vote*, Baptist Press, October 8, 2004. For North Dakota, see David Crary, *Voters in 11 States Decide Same-Sex Marriage Issues*, Associated Press, October 30, 2004. For Ohio, see Cheryl Arnedt, *Poll: Advantage Kerry in Ohio Race*, ABC News, October 19, 2004. For Oklahoma, see Judy Gibbs Robinson, *Gay Activists Put Hope in Court Intervention*, The Oklahoman, October 17, 2004. For Oregon, see *Survey Favors Kerry, Marriage Ban*, Associated Press, October 20, 2004. For Utah, see Deborah Bulkeley, *Emotions Run High on Gay-Marriage Ban*, Deseret Morning News, October 18, 2004.

[19] The polls in Kentucky, North Dakota, and Oklahoma do not appear to have been restricted to voters or likely voters; the other state polls were. See articles cited in note 18, supra.

[20] See, for example, comments of Robin Tyler, Executive Director of The Equality Campaign/DontAmend.com, at http://dontamend.homestead.com/index.html (last checked March 27, 2006) and the terms used by the American Civil Liberties Union of Northern California at http://www.aclunc.org/lesbian-and-gay/knight.html (last checked March 22, 2006).

[21] See, for example, Princeton Survey Research Associates poll, July 13-17, 2005; Boston Globe poll, May 4-9, 2005; and ABC News/Washington Post poll, April 21-24, 2005. Polling gathered at www.pollingreport.com/civil.

Interstate recognition:

DOMA's primary purpose was to bolster state courts' preexisting power to refuse recognition to out-of-state marriages that do not comply with the state's laws and public policy. DOMA did this by making clear that the Constitution's Full Faith & Credit clause should not be read to *require* interstate recognition of same-sex marriages. See 28 U.S.C. § 1738C. However, it is crucial to understand that, as a matter of tradition and comity, states regularly recognize marriages that were solemnized in other states. It is also well established that a state court may refuse to recognize an out-of-state marriage if doing so would contravene local "public policy." At least in the 45 states with laws defining marriage as man-woman, the public policy preferences should be clear, and state courts, therefore, should be constrained to refuse recognition of out-of-state same-sex marriages.

DOMA's effect on interstate recognition is, therefore, quite limited. It just addresses the situation in which a state court refuses to abide by its state public policy and relies on the Full Faith & Credit clause in recognizing an out-of-state, same-sex marriage. However, DOMA will *not* have any effect on a case in which an out-of-state, same-sex marriage is recognized *because the judge believes that the equal protection or due process clauses require it.* DOMA does not "prevent" any court from recognizing out-of-state marriages; it merely removes one of several rationales that a court could use in doing so.

Definition of marriage for purposes of federal law:

DOMA had a second purpose: to define marriage for purposes of federal law. Section 2 of DOMA states that, for the purposes of federal statutes or any ruling, regulation, or interpretation of federal administrative action, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." See 1 U.S.C. § 7. A well-known effect of this language is to ensure that only persons in traditional marriage can file income tax returns as married couples, but the reach is much broader. The General Accounting Office has found that, "as of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges."[22]

The Constitutional Challenges to DOMA

Both provisions of federal DOMA have been challenged in federal court. For example, activists have challenged the interstate recognition provision in a case pending before the U.S. Court of Appeals for the Ninth Circuit, although the district court held the plaintiff lacked standing to challenge that provision.[23] The section defining marriage for federal purposes is being challenged in that same Ninth Circuit case, as well as in federal cases pending in Oklahoma and Washington state.[24] In each case, the plaintiffs argue that the U.S. Constitution's

[22] Letter from GAO Associate General Counsel Dayna K. Shah to Senator William Frist, January 23, 2004, available at http://www.gao.gov/new.items/d04353r.pdf.

[23] *Smelt v. County of Orange*, 374 F.Supp.2d 861 (C.D. Cal. 2005). This case is now pending in Ninth Circuit under docket # 05-56040; oral argument has been set for April 4, 2006.

[24] *Bishop v. Oklahoma* is pending in Northern District of Oklahoma under docket #04-CV-848K(J). *In re Kandu* is pending in the Western District of Washington under docket # 04-CV-05544, which represents a review of

equal protection and due process guarantees require the recognition of same-sex marriages, and that efforts to limit the interstate reach of same-sex marriage or to limit marriage to heterosexual unions for purposes of federal law are unconstitutional. To date, the federal government has been successful in defending DOMA, for example, by prevailing in federal district court in Florida. Nevertheless, same-sex marriage advocates have made clear that they believe DOMA is unconstitutional and that they will continue to press their position in federal courts.[25]

These lawsuits involving federal DOMA do not form the "core" of the campaign in the courts. Instead, same-sex marriage advocates are focusing on direct attacks on state marriage laws, both through state court challenges to statutory DOMAs, and through federal court challenges to state constitutional amendments. The key to the expansion of same-sex marriage in the courts is not striking down federal DOMA, but convincing courts at all levels that same-sex marriage is a fundamental right that cannot be denied.

What Happens if Congress Does Nothing?

Failing to act to protect traditional marriage laws by a constitutional amendment will, in the end, likely result in the judicial imposition of same-sex marriage on a nationwide basis. First, some state supreme courts undoubtedly will strike down state marriage laws. Second, cultural and legal confusion will develop over a period of years as the nation struggles unsuccessfully to deal with a patchwork, state-by-state approach. Third, federal courts will be forced to address fundamental questions of due process and equal protection that will emerge. And, as a result of certain liberal-leaning precedents, the final step could be a U.S. Supreme Court ruling that marriage laws be rewritten to require same-sex marriage in all states.

Step #1: State-by-State Fragmentation via Judicial Activism

At present, legal activists are not asking the courts to impose same-sex marriage on a nationwide basis. Instead, they are targeting their efforts on particular states. As noted above, nine states face challenges to their marriage laws, and as one same-sex marriage advocate wrote earlier this month, it is highly likely that one or more of these state supreme courts will overturn traditional marriage laws.[26] Evan Wolfson, one of the premier gay marriage advocates in the nation, recently told *The American Prospect* that the movement's strategy over the next several years is to have 10 states legalize same-sex marriage.[27]

Thus, the near-term tactical goal of these activists is not national cohesion, but national fragmentation of marriage definitions. Same-sex marriage will be legal in some states, but illegal in neighboring states. The results will not necessarily be regional, either. For example, Washington and California courts may impose same-sex marriage on their states, but Oregon's citizens have already protected themselves *for now* by state constitutional amendment. A Maryland court has already struck down the states' laws, while Virginia will soon adopt a state

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In re Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004). *In re Kandu* has been stayed pending the resolution of the state same-sex marriage cases awaiting decisions from the Washington Supreme Court.

[25] See, for example, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965 (1997); Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* (Cornell Univ. Press 1997), at 138-140.

[26] Graff, The American Prospect, at 41, supra note 10.

[27] Graff, The American Prospect, at 43, supra note 10.

constitutional amendment. Moreover, lawsuits are pending in Iowa, Nebraska, and Oklahoma, and more could spring up in the American heartland. Same-sex marriage, already a reality in Massachusetts, will crop up throughout the nation.

Step #2: Legal and Cultural Confusion Develops Due to Fragmentation

The state-by-state fragmentation of the nation serves the goals of same-sex marriage advocates because the result will be confusion and chaos that cannot long endure.

First, marriage is a fundamental aspect of American culture. The nation has a variety of regional and state-by-state cultural variations, but it also has core values and standards that apply on a national level. Marriage's core components — two people, husband and wife — should be common throughout the nation. This need for cohesion on the nature of marriage was imperative 100 years ago, when Congress required Arizona, New Mexico, Oklahoma, and Utah to include in their state constitutions express provisions banning polygamy "forever" before they could be admitted to the Union.[28] It is even more so today, when the American experience is much more national than regional. As Evan Wolfson has written, "America is one country, not fifty separate kingdoms. If you're married, you're married."[29] Wolfson is correct, and he and his allies are counting on same-sex marriage in a few states (especially large and culturally influential states such as California, New York, and Massachusetts) to pave the way for the spread of the institution throughout the nation. Resistance to this growth will be strong, as the state-level DOMA activity shows. The inevitable result will be increased social and cultural division.

Second, the resulting cultural division will inevitably end up playing out in the courts, as same-sex marriage puts new stresses on the legal system. Homosexual couples who have marriage licenses have every right to move anywhere they want in the nation; it is a fundamental right protected under the Constitution.[30] Many of these lawsuits will have unique fact patterns that cannot be anticipated, because same-sex couples will have many of the same day-to-day interactions with the world as heterosexual couples do. Some will get divorced when their marriage fails. They will execute and enforce wills when one dies. They will open businesses, engage in the economy as a household, and face occasional legal conflicts. Child custody battles will occur, as will cases involving run-of-the-mill torts and contract disputes. But as courts struggle to fit their legal relationships into existing state legal systems, the cases will take on a constitutional dimension.

Consider an example of a complicated case involving recognition of same-sex marriage that is already before the courts. Two Washington state women received a marriage license in Canada and later declared bankruptcy back in Washington. They filed their petition jointly, citing their Canadian marriage license. Because bankruptcy law is federal, and because DOMA directly addresses the definition of "spouse," the bankruptcy court was required to rule on the constitutionality of DOMA as applied to this bankruptcy petition. In 2004, the bankruptcy court upheld DOMA's federal definition,[31] and an appeal was taken to the federal district court, where it is pending today. The federal district court has stayed consideration of the case until the

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[28] See Lynn A. Baker and Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L. J. 75, 118-119, n.202 (2001) (citing state constitutional provisions required as a condition of admission).

[29] See http://www.freedomtomarry.org/document.asp?id=1550 (last checked March 21, 2006).

[30] See *Kent v. Dulles*, 357 U.S. 116, 125 ("The right to travel is part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment").

[31] *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004), on appeal to W.D. Wash., docket #04-CV-05544.

Washington Supreme Court rules on whether same-sex marriage should be mandated in that state, which, the petitioner argues, could impact how the bankruptcy petition should be treated.[32]

This bankruptcy case is one example of the many ways in which same-sex "married" couples living in non-same-sex-marriage states can end up in the legal system. Although 45 states have an expressed policy of opposition to same-sex marriage, and the courts in those states *should* uphold that policy, new fact patterns will constantly arise. Matters involving everything from divorce to child custody to health care to probate will be more complicated and require case-by-case analyses in the courts. Inevitably, courts will reach different conclusions on how to integrate same-sex couples with marriage licenses into the legal and governmental structures of non-same-sex-marriage states. The rules will vary dramatically across state lines, and reasonable questions of fundamental fairness will be raised by those couples.

Step #3: Courts Must Step in and Set National Marriage Policy

Such a fragmented legal system cannot survive indefinitely. Yet the solution to that confusion and chaos is not likely to be the state or federal legislatures, but the courts that are confronting these problems on a routine basis. Federal courts will become increasingly involved (as they already are), and splits in the federal courts will develop. The legal advocates will renew their challenges to DOMA's federal definition of marriage, and they will press courts to recognize out-of-state marriages — first for limited purposes, and then on a wholesale basis. (As discussed above, DOMA's interstate recognition provisions will not bar any court from forcing recognition of those marriages if that decision is based on other parts of the Constitution.)

As federal constitutional cases develop, it is likely that different circuit courts of appeals will resolve some of the core constitutional questions differently. Eventually, then, a question regarding the federal definition of marriage and/or interstate recognition will go to the Supreme Court. Which way will the Supreme Court rule? Nothing in the Constitution *prohibits* same-sex marriage, and, in our current constitutional system, the various applications of marriage law are typically left to the states. Consequently, it would be exceedingly unlikely for the Supreme Court actually to *invalidate* same-sex marriages. On the other hand, it will have a duty to assist the lower courts in the management of the plethora of thorny legal problems that same-sex marriage will have created in a patchwork system. The Court will be under enormous pressure to craft a national solution. The problem for traditional marriage supporters is that the Supreme Court has expanded (or distorted, in some views) the Constitution's equal protection and due process clause enough that a majority would have precedents to stretch and manipulate if it were so inclined. Justice Scalia, in particular, has warned that the Supreme Court's decisions in *Lawrence v. Texas* and *Romer v. Evans* now give same-sex marriage advocates non-trivial arguments in favor of judicial imposition.[33]

In summary, a patchwork of definitions is not likely to endure; to think that it will is little more than wishful thinking. If Congress leaves this question to the state courts, then the ultimate arbiter will be the Supreme Court. And over time, given the existing precedents and the threat that some Supreme Court Justices would twist the case law for social engineering purposes, it is unrealistic to rely on the high court to be a bulwark in defense of traditional marriage laws.

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[32] See Plaintiff's Motion for Stay filed in *In re Kandu*, #04-CV-05544 (W.D. Wash.) and court's entry of stay.
[33] *Lawrence v. Texas*, 539 U.S. 558, 599-605 (Scalia, J., dissenting).

The Solution: the Constitutional Amendment Process

There is a solution to the current predicament, a solution that is more democratic than any other tool in our legal system — the constitutional amendment process. The Constitution's amendment process in Article V should not be treated as a dead letter. This is particularly true when courts are demonstrating a willingness to functionally amend the Constitution on issues of fundamental importance to the American people.

The Amendment Process Enhances Democratic Self-Government

There is no reason to fear constitutional amendments; after all, only through the constitutional amendment process do the people have the opportunity to shape fundamental questions about the ordering of society. The process is super-majoritarian, requiring a two-thirds vote in each house of Congress, followed by the support of three quarters of state legislatures, the representative bodies closest to the American people. It is not a rushed process. Constitutional amendments can take years or even decades to gain the necessary support in Congress, giving time for the issue to be debated throughout the nation. This lengthy debate encourages the kind of grass roots activism that has begun to emerge on both sides of this issue over the past few years, and it gives the people a place to focus that energy.

This issue has already received years of debate, both in Congress and throughout the nation. A constitutional amendment substantially identical to the pending amendment was first introduced in May of 2002 (H. J. Res. 93, 107th Congress). During the 108th Congress, the Senate Judiciary Committee held four hearings on the amendment, and related hearings were held in the Commerce Committee, the Finance Committee, and the Health, Education, Labor, and Pensions Committee.[34] Likewise, the debate over this issue has progressed in the states for many years. As detailed in Chart #3 above (at p. 6), the vast majority of states have passed Defense of Marriage statutes or constitutional amendments since 1996. Moreover, President George W. Bush made it a prominent part of his 2004 reelection campaign, regularly mentioning the issue in his campaign speeches.

The time has come to allow the democratic process to work by sending a constitutional amendment to the states.

How the Amendment will Work

The Marriage Protection Amendment, S.J. Res. 1, reads:

> ***Marriage in the United States shall consist only of the union of a man and a woman.***
>
> ***Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.***

[34] The Judiciary Committee hearings were held on September 4, 2003, March 3, 2004, March 23, 2004, and June 22, 2004. The other hearings were held on April 28, 2004 (HELP), May 5, 2004 (Finance), and May 13, 2004 (Commerce). The House Judiciary Committee also held a hearing on the amendment on May 13, 2004.

The first sentence is straightforward: it defines marriage throughout the United States as an institution solely between one man and one woman. This first sentence simply reaffirms what has long been our national policy and ensures that no state can say otherwise, whether through its courts or through its legislative processes. As discussed above, we are one nation, and there is an urgent need for a common understanding as to the nation's most fundamental social institution.

The second sentence is aimed directly at the problem of judicial activism in this area. It ensures that only the people or their elected representatives, *not judges*, can decide whether to allow marriage or its legal incidents to be conferred on people. In particular, this provision would prevent a repeat performance of what occurred in Vermont, where the state supreme court coerced the legislature to create same-sex "civil unions" under the threat of judicially imposed same-sex marriage. It would prevent courts from *requiring* that state benefits linked to marriage — such as spousal benefits for governmental employees — be extended beyond what the legislature has expressly provided. It would block federal courts from striking down the federal definition of DOMA and mandating joint tax filing for unmarried persons. In short, this second sentence guarantees that *no court* mandates the creation of any institution or arrangement containing the incidents or benefits that the legislature has determined are linked to marriage itself. Courts will not be able to twist constitutional language to serve narrow policy goals.

It is important to note, however, that this constitutional amendment does not bar "civil union" or "domestic partnership" arrangements, nor does it prevent the granting of particular marital benefits to same-sex couples — *as long as those laws are enacted through the legislative process*. Citizens will retain the right to act through their legislatures to bestow whatever benefits to same-sex couples that they choose. Those benefits could be narrow — granting special inheritance rights, for example — or they could be broad — a full "civil union" law, for example. Likewise, Congress would be free to modify federal statutes to allow, for example, joint tax filings for persons in same-sex civil unions or domestic partnerships. The legislature's only constraint is that it could not create same-sex marriage. And more importantly, none of these changes would be imposed through the courts.

The chart below summarizes how this constitutional amendment will affect the authority of courts and legislatures under different circumstances.

Chart #6: Practical Impact of Marriage Protection Amendment

	REDEFINITION OF MARRIAGE	Creation of "Civil Unions" or "Domestic Partnerships"	Granting the Rights or Benefits of Marriage	Employee Benefits Offered by Private Businesses
State or Federal Courts Can Act Alone?	Sentence 1 Prohibits	Sentence 2 Prohibits	Sentence 2 Prohibits	Unaffected by Amendment
Legislature Can Make Change?	Sentence 1 Prohibits	Decision of State Legislature	Decision of Legislature	Unaffected by Amendment

Conclusion

The greatest fallacy of the same-sex marriage debate is the well-meaning, but naïve, belief that Congress need do nothing and that the American people will sort the question out on a state level. Some have even said that congressional silence fits into a "federalist" or "states' rights" approach. This is dangerously false. "States' rights" implies that *the people* will have the opportunity to make this fundamental decision. The evidence is overwhelming that same-sex marriage advocates and their allies in the courts will not allow that to happen. The Constitution is being amended — the only question is whether it will be by judges or by the people. Congress can either send an amendment to the states, or it can allow the courts to impose same-sex marriage nationwide.